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Criminal Protection Orders in Domestic Violence Cases: Getting Rid of Rats With Snakes

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COMMENTS

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I. INTRODUCTION

A long overdue public outcry over the inattention and inaction of local governments to the problem of domestic violence in this country led, throughout the 1980s and into the 1990s, to many changes in the way those governments viewed and approached the problem.[1] Most recently, the O.J. Simpson case threw open the doors for a national discussion concerning violence among family members.[2] As legislatures,

1. During this time, 48 states and the District of Columbia have enacted legislation designed to modify official behavior. Such legislation, often the result of the interplay of pressure from feminist groups, actions of concerned legislators, and professionals in the criminal justice system, has markedly changed the underlying legal philosophy toward the problem of domestic violence.

EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 12 (1990).

2. The media coverage surrounding the double-murder "trial of the century" has had an enormous impact on public perception of the problem. "Polls show that, in 1991, 57 percent of Americans thought spouse abuse was a serious problem. Today, 96 percent do." Alfred Lubrano,

law enforcement agencies, and the judiciary scrambled for responses to the problem, a number of laws, policies, and institutional practices emerged across the country.[3]

This Comment does not challenge the notion that changes in the way government and courts viewed the crime of domestic violence were unavoidable and necessary. Instead, the success of the judicial responses, both legislatively mandated and self-adopted, and the price paid in the process of changing, are examined. Specifically, this Comment focuses on pretrial criminal protective orders, often issued as a condition of pretrial release for defendants in domestic violence cases. For those jurisdictions that allow for such orders through legislation, a number of important issues emerge. The concerns that must be addressed in critically examining criminal protective orders have broad applicability to other important areas of the criminal justice system's response to the domestic violence defendant.[4]

The need for critical examination of the legislative and judicial responses to domestic violence and their effect on defendants' rights is acute. Indeed, while the volume of literature concerned with documenting the enormity of the problem and suggesting an assortment of curative measures has markedly increased in the past decade, academic analysis of the impact these measures have on the domestic violent defendant is virtually nonexistent. What commentary has emerged has been mostly the work of students. This Comment's primary purpose is to encourage a more exhaustive inquiry into the impact the movement to

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Nicole's Legacy: Shedding Light on Domestic Violence, NEWSDAY, June 12, 1995, at 16 (quoting Marissa Ghez, Family Violence Prevention Fund, San Francisco). *See* Haya El Nasser & Andrea Stone, *For Women, a Dire 'Awareness': Domestic Abuse Calls are Spiraling*, U.S.A. TODAY, July 27, 1994, at 3A (documenting a nationwide increase in reported incidents of domestic violence based on media attention towards the Simpson case, and reporting related legislative responses in California and New York).

3. As of September, 1991, nineteen states and the District of Columbia were in the process of organizing gender bias studies or implementing resulting recommendations. Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 247-48 (1993).

4. It is outside the office of this Comment to examine many of the other recent changes in the law which also implicate defendants' rights. Among these changes, for example, are mandatory arrest policies for police responding to domestic violence calls, and "no-drop" prosecution policies for states' attorneys who subsequently prosecute domestic violence cases. Both approaches raise concerns addressed in this paper, and both deserve and have received (albeit to an unsatisfying degree) critical analysis in their own right. *See generally* Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDAM L. REV. 853 (1994) (advocating widespread adoption of no-drop prosecution policies based on perceived benefits); Donna M. Welch, Comment, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133 (1994) (opposing general mandatory arrest laws based on perceived disadvantages, including loss of victim autonomy).

address domestic violence has had on the group with which most advocates seem least concerned (i.e., the defendants). Similarly, I hope that those legislative and judicial bodies currently at work in fashioning a jurisdictional response to the issue will benefit from the analysis and recommendations contained herein.

Part II of this Comment addresses criminal protection orders generally and explores the problem of holding domestic violence defendants prior to release. Part III examines some of the many questions regarding the issuance of criminal protection orders, such as: from where does the power to issue such orders derive?; what class should be protected by such orders?; what evidentiary standard should apply?

Part IV describes some of the release conditions that may be imposed upon a defendant subject to a criminal protection order and raises the problems with prosecutorial, judicial, and alleged victim discretion in determining those conditions.

Part V of this Comment looks at the procedural requirements of criminal protection orders and examines the interests at stake in their issuance. Finally, the Conclusion summarizes the problems and issues presented and makes concrete recommendations to both courts and legislatures addressing the criminal protection order question.

A particular point should also be made by way of introduction. The common masculine references to the defendant in domestic violence cases are a reflection of the fact that the great majority of alleged domestic violence batteries are perpetrated by men[5] and that the bulk of the literature on the subject refers to defendants in domestic violence case as men.[6] Such references are not meant to suggest that men are exclusively the defendants in such cases, nor that women are always the victims.[7]

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5. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 808 n.3 (1993) (95% of all adult domestic violence victims are women); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 10 (1991).

6. For an exception, see Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1407 (1991) (examining the criminal implications of violating a civil protection order).

7. One area where commentators are observing a marked increase in reported domestic violence committed by men against men and women against women is in the homosexual household. *See, e.g.*, CLAIRE M. RENZETTI, VIOLENT BETRAYAL: PARTNER ABUSE IN LESBIAN RELATIONSHIPS 17-19 (1992) (contending domestic violence in a lesbian household occurs more frequently than in a heterosexual household); Jane Furse, *Calls For Help are Ignored in Gays' Domestic Violence*, TIMES-PICAYUNE, Dec. 12, 1993, at A10 (estimating that 500,000 gay men and between 50,000 to 100,000 lesbians annually are battered by their live-in companions).

II. CRIMINAL PROTECTION ORDERS

A. *Criminal Protection Orders Generally*

A criminal protection order ("CPO") is often issued as a condition of pretrial release where there has been an arrest in a case involving domestic violence.[8] For those jurisdictions that have specifically legislated to empower criminal courts to issue such orders,[9] judges will make the CPO a condition of the bail offered to a domestic violence defendant. The conditions contained within the CPO itself, by which the defendant must abide, may be numerous, and the discretion accorded to judges in deciding when to issue a CPO and which conditions to include will vary by jurisdiction.

The CPO is distinguished from the civil protection order, which is a civil remedy afforded to individuals, usually women, through a specific petitioning process. A civil protection order is appropriate where no arrest has been made in connection with an alleged incident of domestic violence, yet the victim voluntarily seeks assistance from the courts.[10] Civil protection orders often impose upon an alleged batterer many of the same conditions imposed upon a criminal defendant and have generally withstood constitutional challenges.[11] In a criminal action, where a CPO would be issued, the state is a party and there is an impliedly higher standard of proof.[12]

The comparison between criminal and civil orders of protection is

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8. Defining what action constitutes "domestic violence" is, in itself, an endeavor wrought with controversy. *See* Laurie K. Dore, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 OHIO ST. L.J. 665, 674 n.34 (1995) (attributing wide variations in domestic violence statistics in part to the difficulty in defining the crime). For the purposes of this Comment, "domestic violence will be defined as violence between heterosexual adults who are living together or who have previously lived together in a conjugal relationship." BUZAWA & BUZAWA, *supra* note 1, at 9. The definition among jurisdictions, scholars, and judges as to what actions constitute domestic violence is by no means a settled issue. *See, e.g.*, FLA. STAT. ch. 741.30 (1992) (encompassing only those criminal offenses resulting in physical injury or death); Lisa G. Lerman, *Statute: A Model State Act: Remedies for Domestic Abuse*, 21 HARV. J. ON LEGIS. 61, 71-72 (1984) (defining domestic violence to include theft of property belonging to another).

9. *See, e.g.*, ALASKA STAT. § 12.30.025 (1995); ILL. ANN. STAT. ch. 725, para. 5/112A-2 (Smith-Hurd Supp. 1995); MINN. STAT. ANN. § 629.72 (West Supp. 1996); N.Y. CRIM. PROC. LAW § 530.12 (McKinney 1995); OHIO REV. CODE ANN. § 2919.26 (Anderson Supp. 1994); S.D. CODIFIED LAWS ANN. § 25-10-23 (1992); UTAH CODE ANN. § 77-36-2.5 (Supp. 1995).

10. For an exhaustive survey of the law of civil protection orders, see generally Klein & Orloff, *supra* note 5.

11. *See, e.g.*, State *ex rel.* Williams v. Marsh, 626 S.W.2d 223 (Mo. 1982); Boyle v. Boyle, 12 Pa. D. & C.3d 767-68 (1979).

12. *See, e.g.*, Marquette v. Marquette, 686 P.2d 990, 993 (Okla. Ct. App. 1984) (holding that an action brought under a statute for civil injunctions codified under the state criminal title was not subject to the "beyond a reasonable doubt" standard of proof for criminal actions because the state was not a party and the action was, by its very nature, civil).

inevitable. An obvious and facially persuasive argument used by those courts and commentators opposed to the systematic issuance of criminal orders of protection is that relief is already universally available to alleged victims via the petitioning process in the civil arena.[13] Even so, the distinction between the two types of orders is sometimes blurred or confused.[14] Indeed, a violation of a civil protection order will often be prosecuted as a criminal contempt charge.[15]

B. *Holding Defendants Prior to Release*

Many commentators feel that the unique nature of the crime of domestic violence, where the parties are not strangers, warrants extreme measures concerning temporary denial of bail to defendants charged in domestic violence cases, and some courts and legislatures have responded to this argument.[16] For instance, in North Carolina, where a judicial officer determines if the immediate release of a domestic violence defendant will be dangerous[17] to either the alleged victim or

13. "Statutes and case law in all states and the District of Columbia provide that the adult abused party may petition the court for an order of protection." Klein & Orloff, *supra* note 5, at 842-43. Where there is an established method of obtaining temporary protection from an alleged batterer, and the method requires an affirmative request for protection by the alleged victim, the judicial officer issuing the civil protection order is assured of the petitioner's sincerity and cooperation in the process. *See infra* part III.F.

14. *See, e.g.*, Lerman, *supra* note 8 (suggesting a model state domestic violence statute combining criminal and civil remedies); Klein & Orloff, *supra* note 5, at 948 (citing a criminal case striking down substance treatment as a condition of bail for proposition that such conditions may be available via the civil protection order process). For a general discussion on the collapsing distinction between civil and criminal law, see Cheh, *supra* note 6.

15. In a decision producing no less than five separate opinions, the U.S. Supreme Court ruled that a subsequent criminal prosecution for conduct originally resulting in a criminal contempt conviction for violating a court order to refrain from domestic violence was not violative of the Double Jeopardy Clause of the Fifth Amendment. United States v. Dixon, 113 S. Ct. 2849 (1993). In a factually similar case decided under the virtually identical language of a state constitution's double jeopardy protection, the Supreme Court of Hawaii refused to follow the majority holding of *Dixon*. State v. Lessary, 865 P.2d 150 (Haw. 1994). The court affirmed the dismissal of a circuit court charge following conviction of a family court charge arising from the "same conduct." *Id.* at 157. "[W]e conclude that the interpretation given to the double jeopardy clause by the United States Supreme Court in *Dixon* does not adequately protected individuals from being 'subject for the same offense to be twice put in jeopardy.' " *Id.* at 155. For criticism of the *Dixon* rationale, see Kirstin Pace, Note, *Fifth Amendment—The Adoption of the "Same Elements" Test: The Supreme Court's Failure to Adequately Protect Defendants from Double Jeopardy*, 84 J. CRIM. L. & CRIMINOLOGY 769, 801-04 (1994) (advocating a "same transaction" test for determining applicability of the Double Jeopardy Clause and concluding that such a test would have barred the subsequent prosecution of the domestic violence defendants in *Dixon*).

16. An extreme and unusual example involved a defendant arrested for a domestic violence battery alleged to have occurred four days earlier, who was held without bond and with no filing of formal charges for 24 days. Martina v. State, 602 So. 2d 1334 (Fla. 5th DCA 1992).

17. The concept of the dangerousness of the criminal defendant has not always been central to the rationale for pretrial release. For an examination of the change in emphasis in bail determinations from the traditional appearance-orientation model to the more contemporary public

another person, the officer "may retain the defendant in custody for a reasonable period of time while determining the conditions of pretrial release."[18] Other statutes are not as open ended. In Utah, a person arrested for a domestic violence offense may not be released prior to "the close of the next *court* day following the arrest," unless the release is conditioned upon either a court order or written pledge barring the defendant from any contact with the alleged victim.[19] A provision in the same act requires an alleged victim to waive in writing any court required "stay-away order," or else a defendant is automatically barred from returning to his home.[20]

Many advocates of domestic violence law reform praise such legislation as necessary for combatting domestic violence crimes.[21] They contend that domestic violence often involves unbridled emotion in the form of rage, and for that reason a mandatory "cooling off" period is needed to insure against recurring violence upon release.[22] This assumes that all situations resulting in an arrest involve such rage, and such an assumption precludes an examination of the factual conditions of each arrest. This approach is facially inconsistent with the constitutional requirements of bail determination, which compel courts to make a case by case determination of whether a reasonable foundation exists

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safety rationale, see John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 17 (1985) (noting that over one-third of the public safety-oriented bail laws provide no definition of what constitutes danger).

18. N.C. GEN. STAT. § 15A-534.1(a)(1) (Supp. 1995).

19. UTAH CODE ANN. § 77-36-2.5(1) (Supp. 1995) (emphasis added). A Friday arrest would presumably mean that a defendant could not be released before the end of business on the following Monday, absent the court order or pledge.

20. *Id.* § 3(a).

21. *See* Kathleen Waits, *The Criminal Justice System's Response To Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 320 (1985) ("States should adopt a law that provides that batterers can be held for twenty-four hours or over the weekend without bail being set.").

22. Professor Waits apparently sees all alleged batterers as fitting a singular uniform profile. "Once in custody, batterers need time for the rage of the severe battering phase to subside." *Id.* The belief that all arrests resulting from alleged domestic violence incidents require a singular and powerful criminal justice response is pervasive in the academic writings on the subject. *See, e.g., Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1523-24 (1993) ("Treatment of the assailant may ultimately protect the victim in lasting fashion, but in the individual case, immediate incapacitation is often the safest and most pressing recourse, and the most effective at achieving preventive goals . . . ."). Such a viewpoint is certainly easier to adopt than one which treats domestic violence defendants in the same way other criminal defendants are treated: as individuals charged with a crime arising from particular circumstances. Alternative approaches have been suggested. *See* MODEL CODE ON DOMESTIC & FAMILY VIOLENCE § 208(1) commentary at 11 (Conrad N. Hilton Found., Model Code Project of the Family Violence Project, National Council of Juvenile and Family Court Judges 1994) (suggesting courts considering pretrial release of a domestic violence defendant should "review the facts of the arrest and detention and . . . evaluate whether the accused poses a threat to the alleged victim . . . ."); *see also infra* parts III.C and V.A.

for denying or revoking bail.[23] Legislation designed to protect against recurring domestic violence through initial denial of bail must be true to this constitutional mandate.

III. Issuance of Criminal Protection Orders

A. *The Power and Discretion of Courts*

The power of the criminal courts to make determinations concerning bail is well grounded in both legislative and judicial history. Questions arise, however, when the judiciary creates conditions to pretrial release that are imposed through both civil and criminal protection orders. While the specific functions of the governmental branches are difficult to point out, and in some cases overlap,[24] separation of powers concerns are often raised where an undue amount of judicial discretion has been granted by state legislatures.[25] The concern in regard to protective orders, both criminal and civil, is that the judiciary takes on a quasi-legislative role in defining what otherwise lawful conduct becomes criminal if engaged in by a domestic violence respondent/defendant.[26] In response to this valid concern, legislatures can and should specifically define the options available to a judicial officer in fashioning reasonable conditions of release, and appellate courts can ensure that lower court determinations are both constitutionally sound and within the scope of judicial powers.[27]

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23. *See* Carbo v. United States, 288 F.2d 282, 286-87 (9th Cir. 1961), *rev'd on other grounds* 369 U.S. 868 (1962).

24. *See* State *ex rel.* Williams v. Marsh, 626 S.W.2d 223, 234 (Mo. 1982) (upholding the delegation by the state legislature to the state courts of the power to define the terms of civil orders of protection).

25. A court should not, for example, be allowed to impose conditions upon the subsequent parole of a convicted criminal defendant as this power lies exclusively with the executive branch. State v. Beauchamp, 621 A.2d 516 (N.J. Super. Ct. App. Div. 1993).

26. [T]hese [civil] statutes often proscribe acts that are not criminal. Since the court, in effect, is creating criminal offenses by the terms of the order—creating essentially personal criminal codes, if you will—not only must the order survive the requirements of specificity and clarity that apply to criminal statutes, but it also must be within the court's authority and must constitute a reasonable exercise of discretion.

Cheh, *supra* note 6, at 1407.

27. The danger of an overreaching judiciary is omnipresent, especially in matters as politically charged as the issue of domestic violence. "If the judiciary were given the general power to randomly select and define action(s) as criminal, guided only by the 'shall be to protect the petitioner' language [of a civil protection order statute], it would violate the Missouri constitution." *Marsh*, 626 S.W.2d at 234.

Similarly, separation of powers issues may arise when the legislature is seen as commandeering the inherent role of the judiciary in response to a particular political climate. *See, e.g.*, Christopher B. Daly, *Judge Draws a Powerful Weapon; Special Rhode Island 'Gun Court' Takes Aim at Firearms-Related Crime*, Wash. Post, Feb. 24, 1995, at A03 (describing the legal

Laws empowering courts to condition release of a domestic violence defendant on the issuance of a CPO vary widely as to the discretion allowed to those courts in determining the conditions. Minnesota, for example, allows for a judge to impose any conditions of release,[28] while Alaska, and many other states, set out a specific list of conditions from which a judge may choose.[29] Where a broad license is provided to the court to fashion any condition for release the statute may be in violation of either the state or federal constitutions.[30] Therefore, legislatures must ensure that particular conditions are set out for judicial application.

B. *Defining the Protected Class*

Determining exactly which individuals may be protected by the issuance of a CPO has proved challenging to both legislators and judges. "The definition of a victim of domestic violence frequently has been the most controversial issue in legislative debate of the abuse laws."[31] Conservative legislators do not wish to be seen as condoning cohabitation and similar nontraditional living arrangements,[32] while more liberal legislatures continue to expand the definition of those persons worthy of protection under a domestic violence statute.[33] Where a statute specifi-

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challenge to a legislatively created specialized court designed to deal exclusively with firearms related crimes).

28. MINN. STAT. ANN. § 629.72 Subd. 2(b) (West Supp. 1996).

29. The Alaska statute mandates that:

> [T]he court shall consider the following conditions and impose one or more conditions it considers reasonably necessary to protect the alleged victim of the domestic violence or stalking, including ordering the defendant (1) not to subject the victim to further domestic violence or stalking; (2) to vacate the home of the victim; (3) not to contact the victim other than through counsel; (4) to engage in counseling . . . ; (5) to refrain from the consumption of alcohol or the use of drugs.

ALASKA STAT. § 12.30.025(a)(1)-(5) (Supp. 1995).

30. "[C]ourts cannot . . . make law like a legislature does . . . . [I]t is most difficult for the people to challenge unlawful acts of the judiciary. So a court exceeding its power is the most grievous violation of constitutional law there is." Kiefer v. State, 762 S.W.2d 800, 802-03 (Ark. 1989) (Hickman, J., concurring) (contending that portions of the judicially promulgated rules of criminal procedure overstepped the court's state constitutional authority).

31. Lerman, *supra* note 8, at 75.

32. *Id.*

33. The District of Columbia city council recently expanded the use of restraining orders in domestic violence cases to include "socially intimate relationships." Stephanie Mencimer, *D.C. Council Backs Major Law, Court Reforms*, LEGAL TIMES, Nov. 7, 1994, at 1. In New Jersey, the Prevention of Domestic Violence Act, N.J. STAT. ANN. § 2C:25-17 to 33 (1995), originally promulgated in 1982, was amended in 1991 to expand the class of protected citizens eligible for civil protection orders to include almost any nonstranger. *See Id.* § 25-19(d).

> The amendment is gender-neutral and is expansive enough to include a same-sex, non-related cohabitant or former cohabitant of a household. This broader class . . . includes lesbians and gays who are presently cohabiting as a non-traditional family with or without children, or who have previously cohabited in a homosexual relationship.

cally sets out the class of individuals to be covered by domestic violence legislation, a court must not unduly expand the statute by an order in favor of an alleged victim that the legislature did not intend to protect.[34]

In New Jersey, a court construed the state's civil protection law[35] as applying only where there was some indicia that petitioner and respondent had shared a home together,[36] and denied petitioner relief where the couple "never, in any sense of the word, shared a household."[37] Certainly, the decision of a court to impose a CPO as a condition of release must likewise be at least partially based on the relationship between the defendant and the alleged victim. More importantly, perhaps, a court must consider the current living arrangements of the alleged victim and batterer in fashioning an appropriate order.

C. *Fact-Finding by the Courts*

It is fundamental to our traditional notions of fairness that a court must make a factual inquiry into the basis and circumstances surrounding an arrest for domestic violence. The law of Minnesota compels a judge to review the facts surrounding arrest and detention,[38] and the comparable criminal statute in New York requires the court to "make a determination" that imposition of a condition to pretrial release is war-

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Hon. Mac D. Hunter, *Homosexuals as a New Class of Domestic Violence Subjects Under the New Jersey Prevention of Domestic Violence Act of 1991*, 31 U. LOUISVILLE J. FAM. L. 557, 558 (1993). An example of legislation that has progressively expanded the class protected is Minnesota's Domestic Abuse Act, MINN. STAT. ANN. § 518B.01 Subd. 2(b) (West Supp. 1996). It was noted that the 1994 version of the statute extended protection to a wide variety of individuals but excluded individuals who neither live together nor had a child in common. Margaret C. Hobday, Note, *A Constitutional Response to the Realities of Intimate Violence: Minnesota's Domestic Violence Homicide Statute*, 78 MINN. L. REV. 1285, 1293 n.45 (1994). *See* MINN. STAT. ANN. § 518B.01 Subd. 2(b) (West 1990). The most recent version of the statute, however, includes "persons . . . who have resided together in the past . . . [and] persons involved in a significant romantic or sexual relationship." MINN. STAT. ANN. § 518B.01 Subd. 2(b)(4), (7) (West Supp. 1996).

34. Ohio, for example, provides for protection of "persons who are cohabiting and are not married . . .; persons who are not married and are not now cohabiting, but who cohabited within one year of the offense; persons who are not married, never were married, who did cohabit at one time, not necessarily within one year, but who are the natural parents of a child; and former spouses," as well as current spouses. John P. Christoff, *Ohio's Domestic Violence Laws: Recommendations for the 1990's*, 19 OHIO N.U. L. REV. 163, 169 (1992). Such defined parameters provide courts with a clear understanding of legislative intent and require no additional judicial construction.

35. N.J. STAT. ANN. § 2C:25-17 to 33 (1995). The New Jersey Prevention of Domestic Violence Act of 1991 provides for "both emergent and long-term civil and criminal remedies and sanctions . . . ." *Id.* § 2C:25-18.

36. Croswell v. Shenouda, 646 A.2d 1140 (N.J. Super. Ct. Ch. Div. 1994).

37. *Id.* at 1146.

38. "The judge before whom the arrested person is brought shall review the facts surrounding the arrest and detention." MINN. STAT. ANN. § 629.72 Subd. 2(a) (West Supp. 1996).

ranted.[39] As important as making a factual inquiry into the allegations surrounding an arrest is the concern that a court make a specific statement, for the record, giving the reason for the issuance of a CPO.[40] The New York law provides that a court "shall state such determination in a written decision or on the record, whether to impose a condition [to release]."[41] The reasons for such a requirement are obvious. Where a legislature requires that a court not merely inquire into the factual foundation for issuing a CPO, but also requires that those reasons appear on the record, reviewability of that decision by a higher court is necessarily enhanced. More importantly, however, defendants are assured that their cases will be examined on a case by case basis and that a CPO will not be issued as a matter of course, but after careful consideration.[42] A defendant has a right to know the reasons for any deprivation or infringement upon his personal interests. Where the state excludes him from his residence, for example, the reason should be explicitly set forth by the court.

D. *The Standard of Order Issuance*

A defendant's general right to bail (except in the most serious cases) is derived from the Eighth Amendment and is codified in most state constitutions.[43] However, a general presumption of release without condition, or release upon the least onerous condition or conditions available to the court,[44] applicable to criminal defendants generally, has not survived the changes in domestic violence law.

A CPO may be issued under current state statutes, for example,

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39. N.Y. CRIM. PROC. LAW § 530.12(5)(a) (McKinney 1995) states:

> [i]n making such determination, the court shall consider, but shall not be limited to consideration of, whether the order of protection is likely to achieve its purpose in the absence of such a condition, conduct subject to prior orders of protection, prior incidents of abuse, extent of past or present injury, threats, drug or alcohol abuse, and access to weapons; . . .

40. "[E]ven where an exercise of discretion is operative there must, as a matter of law, be underlying facts which will support that exercise either in denying bail or fixing the amount of bail." People *ex rel.* Klein v. Krueger, 255 N.E.2d 552, 555 (N.Y. 1969) (holding that the trial court erred in denying bail outright to defendant without clear statement as to the reasons).

41. N.Y. CRIM. PROC. LAW § 530.12(1)(a) (McKinney 1995).

42. The New York courts have subsequently softened the clear language of N.Y. CRIM. PROC. LAW § 530.12(1)(a) (McKinney 1995), in one case holding that "[a]lthough a statement of such findings and conclusions is desirable, it is not constitutionally required in support of a bail determination, as long as the reasons for the determination are apparent from the record." People v. Forman, 546 N.Y.S.2d 755, 766 (N.Y. Crim. Ct., 1989). *Cf. In re* York, 27 Cal. Rptr. 2d 771, 779 (Cal. Dist. Ct. App. 1994) (holding that the imposition of a special condition to defendants' pretrial release on their own recognizance required an individual determination and showing of facts that such a condition was warranted in each case).

43. For a general discussion see Goldkamp, *supra* note 17, at 7 n.26.

44. *Id.* at 12-14.

when reasonably necessary to protect the alleged victim,[45] when release without condition would be inimical to public safety,[46] when the safety and protection of the petitioner may be impaired,[47] and where there is possible danger or intimidation to the alleged victim or another.[48] Conversely, some statutes enabling courts to issue CPOs for domestic violence offenses are silent as to the standard of issuance a court should apply,[49] apparently leaving such a determination to the established judicial rules concerning bail. Those states that do not set out a standard of issuance leave open the possibility that such orders will be issued as a matter of course, with no inquiry by the court as to the basis of the CPO.[50]

The relatively low threshold for issuance of a CPO can be contrasted with the standard for issuance of an ex parte civil protection order which may require an "immediate and present danger of abuse."[51] Of course, in a criminal context probable cause will exist to presume that abusive conduct has occurred, and thus, a lower threshold for issuing a protective order may be warranted. Courts should nevertheless apply a cognizable standard even in the criminal arena, since in practical terms the resulting deprivations to the criminal defendant and the civil respondent are the same.

E. *Evidentiary Standard for Criminal Protection Orders*

Courts have differed as to what standard of proof to apply in cases where a CPO is sought. However, what is clear is that the traditional

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45. ALASKA STAT. § 12.30.025(a) (1995).

46. MINN. STAT. ANN. § 629.72 Subd. 2(a) (West Supp. 1996).

47. OHIO REV. CODE ANN. § 2919.26(C) (Anderson Supp. 1994).

48. N.C. GEN. STAT. § 15A-534.1(a)(1) (Supp. 1995).

49. *See, e.g.*, S.D. CODIFIED LAWS ANN. § 25-10-23 (1992); UTAH CODE ANN. § 77-36-2.5 (Supp. 1995).

50. The Massachusetts experience in issuing civil protection orders is instructive on this point. The legislature established the "Domestic Violence Recordkeeping System," a registry designed to assist judges in determining whether or not to issue a civil protection order by providing the criminal history of the alleged batterer. *See* MASS. GEN. LAWS ANN. ch. 209A, §§ 1-10 (Supp. 1995). During the first year following enactment of the supposedly curative statute, 50,874 restraining orders were issued at a rate of about 1,000 per week. "Some judges report that fear of deadly consequences has resulted in the automatic issuance of preliminary restraining orders without weighing the merits of the complaint." *The Domestic-Violence Registry*, MASS. LAWS. WKLY., Apr. 11, 1994, at 10. Carefully evaluating the facts and circumstances surrounding the issuance of any protective order, criminal or civil, and making those findings known in cases where an order is issued, while perhaps less efficient, is more consonant with traditional notions of fairness. *See Preventing Domestic Violence*, MASS. LAWS. WKLY., Oct. 12, 1992, at 10 (suggesting fine-tuning new domestic violence statute to ensure equitable treatment of alleged batterers).

51. State *ex rel.* Williams v. Marsh, 626 S.W.2d 223, 229 (Mo. 1982) (construing Missouri's Civil Protection Statute, MO. REV. STAT. § 455.085.3 (1980)).

evidentiary standard of proof for criminal proceedings—beyond a reasonable doubt—is not to be employed. "Reasonable factual support" for the issuance of a protective order prior to trial, as applied by a New York court in *People v. Forman*,[52] amounts to a preponderance of the evidence standard usually employed in a civil context. The determination as to what standard to apply generally has been left to the courts by the legislatures who have passed domestic violence criminal protection legislation.[53]

The *Forman* court touched on, but refused to decide, whether a higher standard of proof might be constitutionally compelled. "[T]he court does not determine in this case whether a finding of a danger of intimidation or injury to complainant need only have reasonable factual support in the record . . . or, whether a higher evidentiary standard is required under the Fourteenth Amendment to support defendant's continued exclusion from his home."[54] The question of whether a higher burden should attach where a constitutionally protected interest is at stake in a criminal proceeding is a valid one. In fact, where no statutory burden of proof is mandated by a legislature at all, the failure to impose such an evidentiary standard could, in itself, constitute a deprivation of due process under the Constitution.[55] Courts have not, on the whole, taken this question seriously, but the issue deserves greater attention as the universe of judicial options for the victims of domestic violence, both civil and criminal, expands to address the problem.

F. *Petitioner Requirement for Criminal Protection Orders*

While a civil order of protection will by definition be sought by a specific petitioner, usually the alleged victim of domestic violence, most statutes authorizing court issuance of a CPO do not require a specific petitioner as a condition of issuance.[56] In Illinois, the state's attorney must file a CPO petition on behalf of and naming the alleged victim.[57] The Ohio statute allows for the person who made the arrest to file on

52. 546 N.Y.S.2d 755, 759 (N.Y. Crim. Ct., 1989).

53. It has been suggested that a legislative adoption of a preponderance standard of proof for hearings on CPOs would not violate the due process rights of criminal defendants. *See* Lerman, *supra* note 8, at 94.

54. *Forman*, at 759 n.1.

55. *See* State v. Naegele, No. 90-920, 1980 LEXIS (Ohio Ct. App. Nov. 19, 1980) (raising, but not deciding, the question).

56. *See, e.g.*, ALASKA STAT. § 12.30.025 (1995); MINN. STAT. ANN. § 629.72 (West Supp. 1996); N.Y. CRIM. PROC. LAW § 530.12 (McKinney 1996); N.C. GEN STAT. § 15A-534.1 (Supp. 1995); S.D. CODIFIED LAWS ANN. § 25-10-23 (1992); UTAH CODE ANN. § 77-36-2.5 (Supp. 1995) (although an alleged victim may waive the required CPO). *Id.* § 2.5(3)(a).

57. ILL. REV. STAT. ch. 725, para. 5/112A-2(a)(i) & (ii) (Smith-Hurd Supp. 1995).

behalf of the "complainant"[58] and even allows the court, *sua sponte*, to issue a temporary protection order as a pretrial condition of release.[59] This Ohio law was challenged in *Ohio ex rel. Mormile v. Garfield Heights Municipal Court*,[60] where from late October, 1991, to May, 1992, a husband and wife repeatedly petitioned the trial court to remove a condition of the husband's release on a domestic violence charge that he vacate his marital home.[61] The appeals court upheld the trial court's actions, even where neither the wife nor the arresting officer had requested the order as a condition to bond.[62]

Requiring a petitioner for the issuance of a CPO raises the issue of alleged victim input and the proper weight to be afforded the alleged victim's wishes. The issue raises strong feelings among experts and advocates in the field. Professor Waits, for example, asserts that "[a] good rule is that her views should be accorded great deference when she wants the law to take action against the batterer, but should be given less weight when she says she wants to protect him."[63] Such a standard is anathema to a sound judicial inquiry into the facts of a particular case. Applying such a rule amounts to a reverse form of the well-documented gender bias of American courts.[64] It would simply be another incarnation of traditionally paternalistic judicial attitudes meant to minimize the free choice and empowerment of women. In adopting such a standard, a court would effectively be telling the alleged victim of a crime that her input is unwelcome because the court knows better than she does what

58. OHIO REV. CODE ANN. § 2919.26(A)(1) (Anderson Supp. 1994). Ohio allows for warrantless arrests by law enforcement where the alleged victim signs a statement claiming violence has recently taken place in the household. OHIO REV. CODE ANN. § 2935.03(B)(2)(a) (Anderson Supp. 1994). Many jurisdictions, however, have enacted mandatory arrest legislation which does not involve seeking input from the alleged victim. *See, e.g.*, OR. REV. STAT. § 133.310(6)(a) (1993). As of 1990, nine states had mandatory arrest policies for misdemeanor domestic violence offenses. BUZAWA & BUZAWA, *supra* note 1, at 96. The many issues which emerge from mandatory arrest legislation are outside the scope of this paper. *See* discussion *supra* note 4.

59. OHIO REV. CODE ANN. § 2919.26(D) (Anderson Supp. 1994).

60. 607 N.E.2d 890 (Ohio Ct. App. 1992), *appeal dismissed*, 602 N.E.2d 249 (Ohio 1992).

61. *Id.* at 890.

62. *Id.* at 890-91.

63. Waits, *supra* note 21, at 307. The supposed reasons for such a rule are (1) the law is obliged to deter batterers even where the victim refuses to pursue deterrence; (2) when the battered woman takes legal steps her actions are consistent with legal goals; (3) a victim who expresses disinterest in deterring a batterer does so from learned helplessness; (4) a battered wife is more likely to minimize than exaggerate her husband's brutality; (5) where she seeks harsh penalties her personal safety probably rests on the outcome. *Id.*

64. *See generally The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745, 745-1106 (1994); John J. Curtin Jr., *Combating Gender Bias*, 77 A.B.A. J. 8 (1991); Judith Resnick, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195 (1993); *see also supra* note 3.

happened and what is best for her family.[65] Courts that allow for issuance of COPs that condition release upon requirements such as staying away from the alleged victim or staying out of a shared residence, and do so without knowing, or in opposition to, the wishes of the alleged victim may be doing more to create a problem than to solve one.

IV. CONDITIONS OF CRIMINAL PROTECTION ORDERS

A. *Court Discretion*

Statutes vary widely on the discretion allowed to a court as to which conditions to include or consider in a CPO, or even whether or not to issue one at all. Alaska, for example, provides for no discretion in the consideration of the possible conditions for a CPO.[66] The statutes of Ohio and Minnesota, on the other hand, allow for discretion in imposing any terms in an order but do not mandate which conditions must be considered by the court.[67] The most common condition of a CPO is a "no contact" order, where the defendant is prohibited from contacting the alleged victim. Neither Utah's[68] nor South Dakota's law allows for judicial discretion, mandating that a no contact condition be part of any issuance of bond in domestic violence cases.[69]

A mandatory no contact condition is the recommendation of the National Council of Juvenile and Family Court Judges as well,[70] and has

65. An often cited and extraordinary example of judicial paternalism is Justice Bradley's concurring opinion in a nineteenth century case in which the U.S. Supreme Court upheld as constitutional an Illinois Supreme Court ruling barring women from being licensed as attorneys. Bradwell v. State, 83 U.S. (16 Wall.) 130, 130-33 (1872). In arguing for the prudence of a per se rule restricting women, Justice Bradley argued "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based on exceptional cases." *Id.* at 141-42 (Bradley, J., concurring). For an interesting discussion regarding gender equality and judicial paternalism, see Frances Olsen, *From False Paternalism to False Equality: Judicial Assaults on the Feminist Community, Illinois 1869-1895*, 84 MICH. L. REV. 1518, 1522 (1986) ("In the nineteenth century, as today, the choice between equal treatment and different treatment for women could not be made in the abstract, but only in context, case by case.").

66. "[T]he court *shall* consider the following conditions and impose one or more conditions it considers reasonably necessary . . . ." ALASKA STAT. § 12.30.025(a) (1995) (emphasis added).

67. Minnesota's law states "the judge may impose any conditions of release that will reasonably assure the appearance of the person for subsequent proceedings, or will protect the victim of the alleged harassment or domestic abuse . . . ." MINN. STAT. ANN. § 629.72 Subd. 2(b) (West Supp. 1996). Ohio's law states "the court may issue a temporary protection order, as a pretrial condition of release, that contains terms designed to ensure the safety and protection of the complainant . . . ." OHIO REV. CODE ANN. § 2919.26(C) (Anderson Supp. 1994).

68. UTAH CODE ANN. § 77-36-2.5(1)(a) (Supp. 1995).

69. "If bond for the defendant in any domestic abuse action is authorized, a condition of no contact with the victim shall be stated and incorporated into the terms of the bond." S.D. CODIFIED LAWS ANN. § 25-10-23 (1992).

70. As quoted in EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CHANGING

received support from commentators and judges alike.[71] A pretrial process containing a no contact requirement, however, can be objectionable. Where no discretion is allowed or no fact-finding is made by a court, the worth of the alleged victim in the process is minimized and the potential for an unjust deprivation of the defendant's rights is increased. Jurisdictions that allow for such a condition, but do not mandate it, provide for a more flexible and procedurally sound determination by their courts.

B. *Prosecutorial Discretion*

Where a court lacks either the legislative empowerment or the inclination to assume the role of petitioner for CPOs, that role may fall on the prosecutor. In San Francisco, for example, the prosecutor of a domestic violence case will automatically request a stay away order at the defendant's first appearance, unless the victim specifically indicates that she does not want one.[72] Alternatively, a jurisdiction may decide not to solicit the alleged victim's input at all, instead placing the decision solely upon the prosecutor's office, and in some instances removing any discretion and mandating that the state's attorney request a CPO.[73] Whether legislatively mandated or institutionally created, a system that minimizes or ignores alleged victim input and fails to examine the particular facts of a domestic violence case poorly serves both the alleged victim and the criminal defendant.

C. *Conditions of Criminal Protection Orders*

The conditions specifically allowed by state statutes that permit courts to issue CPOs are varied. The most common is a condition prohibiting further acts of abuse by the alleged batterer against the alleged victim.[74] Such a condition is uncontroversial and seemingly innocuous as a prerequisite for release. More serious questions are raised by the issuance of a CPO that requires a defendant to stay away

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CRIMINAL JUSTICE RESPONSE 168 (1992). *Cf.* Lerman, *supra* note 8, at 106 (discussing model legislation which lists, but doesn't mandate, a no contact/stay-away order as an available form of relief).

71. A mandatory no contact order is apparently the institutional practice of the courts, for example, in Westminster, Colorado, which employs an accelerated docket for domestic violence cases and where a condition of all bonds requires that a defendant be removed from the premises where the incident occurred and have no contact with the victim. Fredric B. Rodgers, *Develop an Accelerated Docket for Domestic Violence Cases*, 31 JUDGES' J., Summer 1992, at 2, 6.

72. BUZAWA & BUZAWA, *supra* note 70, at 169.

73. Such is the recommendation in section 4.04 of Lerman's Model Code. Lerman, *supra* note 8, at 104. Section 4.04(A) reads: "Upon the filing of any criminal action involving domestic violence, the prosecuting attorney shall request by motion that a protection order be issued as a condition of pretrial release . . . ." *Id.*

74. *See, e.g.*, Alaska Stat. § 12.30.025(a)(1) (1995); ILL. ANN STAT. ch. 725, para. 5/112A-14(b)(1) (Smith-Hurd Supp. 1995); N.C. GEN STAT. § 15A-534.1(a)(2)(b) (Supp. 1995).

from the home of the alleged victim.[75] Where the parties are not currently cohabitating, such a condition is less burdensome upon a defendant than where the issuance of the CPO results in the exclusion of the defendant from property he would otherwise be lawfully allowed to possess and enjoy.[76]

Other possible conditions of pretrial release for a defendant in a domestic violence case may involve staying away from the school, business, or workplace of the alleged victim,[77] or may preclude the defendant from any contact with the alleged victim whatsoever.[78] Mutual orders of protection exist where a court conditions the release of a defendant on the parties' having no contact with each other. While at one time popular in both civil and criminal proceedings, these mutual orders have become generally discouraged and are now rarely used.[79]

The defendant also may be ordered to refrain from molesting, removing, or using the personal property identified in the CPO,[80] even where the court fails to inquire into who possesses the right to use or holds title to that property. A final condition that may be included in a CPO states the terms under which a defendant may visit his or her child.[81] Where the possible permissible conditions to be included in a CPO are set out by statute, the discretion of the court is minimized and concerns of creating a "mini-criminal code" are mitigated. Where a court can fashion any sort of condition to a CPO, the potential for overburdening the rights of a presumably innocent defendant are increased.

V. PROCEDURAL REQUIREMENTS

A. *Criminal Protection Order Hearings*

There are a number of procedural requirements that must be met when a criminal defendant is deprived of a constitutionally identified right or liberty interest. Foremost among these is the right to a hearing

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75. *See, e.g.*, ALASKA STAT. § 12.30.025(a)(2) (1995).

76. *See* discussion *infra* part V.C.

77. *See, e.g.*, N.Y. CRIM. PROC. LAW § 530.12(1)(a) (McKinney 1995); N.C. GEN. STAT. § 15A-534.1(a)(2)(a) (Supp. 1995).

78. S.D. CODIFIED LAWS ANN. § 25-10-23 (1992) makes such a "no contact" condition mandatory for pretrial release.

79. Mutual orders for protection should not be issued as a matter of course as they are difficult to enforce and send the wrong message to the victims of domestic violence that they are equally to blame. Chief Justice A. M. Keith, *Domestic Violence and the Court System*, 15 HAMLINE L. REV. 105, 113 (1991). Such orders can be made available where both parties file for such an order. *See* MO. REV. STAT. § 455.050.20 (1980). For an extensive discussion of mutual orders of protection, see Czapanskiy, *supra* note 3, at 253 n.17.

80. *See, e.g.*, N.C. GEN. STAT. § 15A-534.1(a)(2)(c) (Supp. 1995).

81. *See, e.g., id.* § 15A-534.1(a)(2)(d).

concerning the deprivation.[82] In those jurisdictions that have legislated to allow the issuance of criminal protective orders, the approaches to the hearing issue have been varied. North Carolina[83] and Utah,[84] for example, have enacted statutes that are silent on the subject of holding a hearing to determine the propriety of issuing a restrictive CPO, presumably leaving the question to their respective judicial systems.[85] Conversely, Ohio's law[86] specifically requires that a hearing concerning whether or not to issue the CPO occur within twenty-four hours of the filing of a motion that requests its issuance.

Where no legislative guidance is provided concerning whether to have a hearing, or in what form that hearing should take place, courts have nonetheless found that hearings are constitutionally compelled. In *People v. Derisi*,[87] a New York court found a domestic violence defendant was entitled to a hearing on his continued exclusion from his home and personal possessions following the issuance of a CPO.[88] While the statute under which the CPO had been issued did not expressly mandate that a hearing be held,[89] the court found that other provisions of the state code compelled the issuing court to allow for a hearing when the defendant challenged the CPO.[90]

The right to be heard in cases where a CPO has been or will be issued is important,[91] yet it is certainly distinct from the right to an evidentiary hearing on the need for such an order. In *People v. Forman*,[92] another New York court, passing on the same statute at issue in *Derisi*, held that not only was a hearing necessary but that a "defendant, by counsel, was entitled to present facts and law in opposition to the [CPO] application."[93] The New York statute, in fact, requires that "[s]ufficient

82. The Fourteenth Amendment to the U.S. Constitution provides "nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ." U.S. CONST. amend. XIV, § 1. "[S]ome kind of hearing is required at some time before a person is finally deprived of his property interests. . . ." and likewise "a person's liberty is equally protected . . . ." Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974).

83. N.C. GEN. STAT. § 15A-534.1 (Supp. 1995).

84. UTAH CODE ANN. § 77-36-2.5 (Supp. 1995).

85. Neither state's judicial system has, to date, passed on this question.

86. OHIO REV. CODE ANN. § 2919.26(C) (Anderson Supp. 1994).

87. 442 N.Y.S.2d 908 (N.Y. Dist. Ct. 1981).

88. *Id.* at 908-09.

89. 1980 N.Y.Laws 530 § 12.

90. *Derisi*, 442 N.Y.S.2d at 909.

91. There is an old saw that a man's house is his castle. If modern times will not permit him moats and battlements, it still remains, I strongly suspect, that the constitution insists that he be allowed, except in exceptional circumstances, a few words before the sheriff escorts him out the door.

Geisinger v. Voss, 352 F. Supp. 104, 111 (E.D. Wis. 1972) (opinion by Reynolds, J.).

92. 546 N.Y.S.2d 755 (N.Y. Crim. Ct., 1989).

93. *Id.* at 762.

facts must be present to enable the court to make a determination 'on the basis of the available information.' "[94]

When courts construe vague or incomplete legislation to require an evidentiary showing on the part of the prosecution seeking a CPO, and allow a defendant to present a case in opposition of that order, fundamental notions of due process are upheld.[95]

In practice, however, many courts empowered to issue CPOs as a condition of pretrial release may be disregarding the requirement of a hearing.[96] Where a statute is silent as to the necessity and right of a hearing, and where CPOs are continually issued absent a meaningful judicial inquiry, the integrity of the justice system is compromised. Jurisdictions must draft appropriate legislation to ensure that where deprivations of liberty interests[97] of domestic violence defendants take place, the primary procedural safeguard of a hearing is offered and conducted in a meaningful manner.

B. *Other Procedural Concerns*

Apart from the requirement of a hearing, defendants in domestic violence cases should enjoy the same protections and procedural safeguards afforded to all criminal defendants charged with similar crimes.[98] Where a CPO is issued, for example, a defendant is entitled to a clear and definite statement[99] as to the conditions of that order, as well as notice as to its issuance. Any legislature empowering criminal courts to issue CPOs should make such requirements explicit in a statute, because

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94. *Id.* (citing the statute).

95. " 'Due process requires that there be an opportunity to present every available defense.' " Lindsey v. Normet, 405 U.S. 56, 66 (1972) (quoting American Surety Co. v. Baldwin, 287 U.S. 156, 168 (1932)).

96. In describing the benefits of an accelerated docket for domestic violence cases in Westminster, Colorado, for example, Judge Frederic B. Rodgers makes no reference to the necessity of a hearing either before or after the issuance of an order. Such an order prohibits a defendant from returning to the scene of the alleged incident, usually his home. These orders are, incidentally, issued as a matter of course in all cases involving domestic violence in that jurisdiction. Rodgers, *supra* note 71. The same lack of a hearing and notification to a defendant as to the right to a hearing was observed by the author during the summer of 1994 in the daily workings of the Dade County, Florida, Domestic Violence Court. This court likewise issued CPOs in virtually all cases, without prior factual inquiry, as a condition to pretrial release.

97. *See* discussion *infra* section V.C.

98. To deny this assertion would be to ignore not the only constitutional guaranty of due process but the notion of equal protection expressed in the 14th Amendment of the U.S. Constitution and included in many state constitutions, as well. The concern of equal protection by courts and commentators in the arena of domestic violence, however, has historically been limited to the rights of the victims of that violence. *See, e.g.*, BUZAWA & BUZAWA, *supra* note 70, at 93-99 & 158.

99. *See* Cheh, *supra* note 6, at 1405 (suggesting the application of the same standard to civil protection orders with criminal contempt proceeding resulting from a violation).

a violation of a CPO implicates the future liberty interests of a defendant and an unclear or unarticulated order increases the likelihood of a violation and subsequent arrest or prosecution for criminal contempt.

Utah's Cohabitant Abuse Procedures Act,[100] for example, requires that where a defendant is arrested for domestic violence,[101] the arresting officer must provide both the alleged victim and batterer with a written notice of the automatic requirements of the CPO statute, which includes a mandatory no contact provision.[102] While the judge or magistrate must thereafter issue written findings and determinations following the defendant's nonwaivable first appearance,[103] the statute does not require that the defendant be provided with a copy of any court order ultimately issued. By failing to require that a copy be presented to the defendant, the statute leaves such notification to the discretion of the court issuing the order. An amended Minnesota statute[104] requires that the defendant be served with a copy of the CPO, but also specifically states that failure to do so does not invalidate the conditions of the order.[105]

Such provisions work to deny a defendant the adequate notice necessary to ensure compliance with a CPO and implicate serious due process concerns. Legislation and court proceedings allowing for both civil and criminal protection orders should, therefore, include a clear statement of the conditions being imposed upon a defendant which should be presented to the defendant prior to release. The duration of the CPO should likewise be made clear to the defendant upon release.

Legislation that allows for the issuance of CPOs should also state specifically that such an issuance is not admissible as evidence of guilt in the eventual trial for the crime charged. The vast majority of state statutes relating to CPOs, however, contain no such procedural safeguard.[106] One notable exception is Ohio's statute[107] which ensures that a temporary CPO issued as a condition of pretrial release "[s]hall not be construed as a finding that the alleged offender committed the alleged

100. UTAH CODE ANN. § 77-36-1 to 8 (Supp. 1995).

101. "Domestic violence" is narrowly defined as a criminal act against a "cohabitant," but seemingly includes any activity separately defined by statute as criminal. *See* UTAH CODE ANN. § 77-36-1(2)(a)-(n) (Supp. 1995) (including in the definition of domestic violence the "discharge of a firearm from a vehicle, near a highway, or in the direction of any person, building or vehicle . . . ."). For a discussion of the problem of properly defining the crime, see *supra* note 8.

102. UTAH CODE ANN. § 77-36-2.5(7) (Supp. 1995).

103. *Id.* § 77-36-2.6(3) (Supp. 1995). For discussion of requiring courts to make specific findings of fact, see Part III.C, *supra.*

104. MINN. STAT. ANN. § 629.72 Subd. 2(b) (West Supp. 1996).

105. *Id.*

106. *See, e.g.*, ALASKA STAT. § 12.30.025 (1995); MINN. STAT. ANN. § 629.72 (West Supp. 1996); S.D. CODIFIED LAWS ANN. § 25-10-23 (1992); UTAH CODE ANN. § 77-36-2.5 (Supp. 1995).

107. OHIO REV. CODE ANN. § 2919.26(E)(3) (Anderson Supp. 1994).

offense, and shall not be introduced as evidence of the commission of the offense at the trial of the alleged offender on the complaint upon which the order is based."[108] Including such a provision in CPO legislation is essential to maintaining fairness in judicial systems that so often issue such orders automatically in all domestic violence cases.[109]

C. *Interests and Rights of Defendants at Issue*

No examination of the issues surrounding criminal protective orders is complete without an analysis of the defendant's rights and interests in cases where a CPO is issued. Victim advocates are often anxious to minimize, or even deny, the domestic violence defendant's rights. They may fear that recognition of the principle that the basic protections guaranteed to all criminal defendants should apply equally to those charged with domestic violence, would compromise and curtail the progress made in combatting the problem. A recognition of the interests in question and the applicability of the constitutionally mandated protections to these cases does not necessarily lead to this result, and should nonetheless operate outside of these collateral concerns.

The Fifth and Fourteenth Amendments to the U.S. Constitution prohibit the federal government and any state from arbitrarily depriving any person, including the criminal defendant, of property or liberty.[110] The interest at risk of deprivation via the process in question must be considered by the court poised to impose the deprivation. The United States Supreme Court, in *Mathews v. Eldridge*,[111] considered this question after a worker was denied a hearing before the termination of his federal disability benefits. Under the Due Process Clause of the Fifth Amendment, the Court set out a test that came to apply to the states as well, and that has been employed by courts in examining deprivation of property rights in domestic violence cases.[112] The Court enumerated four factors to consider in determining whether a deprivation imposed

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108. *Id.* This statute has been cited as influential in proposed legislation. *See* Lerman, *supra* note 8, at 104.

109. *See supra* note 96 and accompanying text. Indeed, such is the recommendation of Professor Christoff in his analysis of the same Ohio statute. Christoff, *supra* note 34, at 194.

110. "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . ." U.S. CONST. amend. V; "nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ." U.S. CONST. amend. XIV § 1.

111. 424 U.S. 319 (1976).

112. For example, in Blazel v. Bradley, 698 F. Supp. 756, 763 (W.D. Wis. 1988), the considerations undertaken by the *Mathews* Court were used to analyze the respective rights at issue in a domestic violence case. The federal district court, in construing a Wisconsin statute authorizing ex parte civil protection orders, expressed concern that, while *Mathews* provided a mechanism for identifying and weighing rights, the case was silent on what specific procedural protections best addressed those rights. *Id.*

by a state comports with the guarantees of due process. The first factor is the private interest that will be affected by the state's action.[113] Unless the interest at issue meets the threshold requirement of being constitutionally protected, however, procedural concerns such as a meaningful hearing are not implicated. The other factors include the risk of erroneous deprivation, the probable value of additional safeguards, and the interest of the state government at issue.[114] When acting to deprive a domestic violence defendant of a liberty or property interest, therefore, a court considering issuance of a CPO must first identify and consider the interest in order for the deprivation to be constitutional.

What a court may define as a properly held property interest has been broadened,[115] and sometimes limited[116] over time. It is beyond dispute, however, that an individual has a property interest in the enjoyment of his personally owned or leased property. Courts that have passed on the constitutionally of civil protective orders have consistently held that depriving someone of the use and possession of his home directly implicates a constitutionally recognized property right.[117]

The U.S. Constitution requires that the property interest be weighed against the state's interest. A tension develops between the state's legitimate police power in protecting state citizens and the individual's right to possess and enjoy personal property.[118] Identifying that the tension exists is the first step in fashioning an appropriate order. Courts, by dispensing with procedural protections designed to facilitate the informed consideration of the rights at stake in a particular case, often

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113. *Mathews*, 424 U.S. at 334-35.

114. *Id.* at 335.

115. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 574 (1975) (finding a property right contained in a public educational scheme created by Ohio and holding that the temporary deprivation of such a right via suspension, even where short, is still a serious event worthy of procedural protection); Goldberg v. Kelly, 397 U.S. 254, 261-62 (1970) (finding a property interest in statutorily created welfare benefits); *see generally* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

116. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134, 155 (1974) (Rehnquist, J.) ("The types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under the Clause in dealing with one set of interest which it protects may not be required with another set of interests."), *reh'g denied*, 417 U.S. 977 (1974)

117. In Blazel v. Bradley, 698 F. Supp. 756, 763 (W.D. Wis. 1988), the court explicitly recognized such a right, finding that under "the *Mathews* factors, it is apparent that substantial procedural protections are mandated by the strength of the [alleged batterer's] interest in his home . . . ." *See also* Geisinger v. Voss, 352 F. Supp. 104, 109 (E.D. Wis. 1972) ("[T]here would be little room to argue that temporary deprivation of one's home is not a deprivation of an interest encompassed within the Fourteenth Amendment's procedural due process protection"); State *ex rel.* Williams v. Marsh, 626 S.W.2d 223, 230 (Mo. 1982).

118. *See, e.g.*, Boyle v. Boyle, 12 Pa. D. & C.3d 767, 773 (1979) (upholding the Pennsylvania civil protection order statute). "[W]e hold that the act in question validly employs the police power of the Commonwealth, in a reasonable manner, to abate a well recognized and widely spread social problem. . . . The restrictions that the act places on the use of property to protect abused spouses . . . are necessary to dispel the dangers of domestic violence." *Id.*

fail to make factual inquiries into the living status of the parties to a domestic violence case, or fail to inquire into the property interests the defendant and alleged victim hold in a particular home. When this occurs the proper balance between the rights and duties at issue can not be found.

Not surprisingly, however, most statutes allowing for CPOs do not require that courts make such an inquiry. The exception is the Illinois CPO statute.[119] This enactment sets out, as one of the remedies to be afforded in a CPO, a grant of exclusive possession and use of a residence to an individual that the court has preliminarily found to have been abused.[120] Such a grant is made only where the alleged victim has a right to occupy the residence or household, which is defined in the same section,[121] and where both the alleged victim and defendant have a right to occupancy, only after balancing the hardships to each, with the presumption of greater hardship to the petitioner/alleged victim.[122]

The Illinois law, which applies in both criminal and civil settings, goes a long way to ensure a judicial inquiry into the property interests involved takes place before the criminal defendant/civil respondent is excluded from his residence. Jurisdictions that do not provide for such an inquiry risk creating a system where courts issuing CPOs fail to consider the property rights of the parties to a domestic violence case, in obvious violation of constitutional protections.[123]

A defendant's interest in his property is by no means the sole interest at issue when a court considers a CPO. For example, the reputation

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119. ILL. ANN. STAT. ch. 725, para. 5/112A-14(b)(2) (Smith-Hurd Supp. 1995).

120. *Id.*

121. A party has a right to occupancy of a residence or household if it is solely or jointly leased by that party, that party's spouse, a person with a legal duty to support that party or a minor child in that party's care, or by any person or entity other than the opposing party that authorizes that party's occupancy . . . .

Id.

122. If petitioner and respondent each has the right to occupancy of a residence or household, the court shall balance (i) the hardships to the respondent . . . resulting from entry of this remedy with (ii) the hardships to petitioner . . . resulting from the continued exposure to the risk of abuse (should petitioner remain at the residence or household) or from loss of possession of the residence or household (should petitioner leave to avoid the risk of abuse) . . . The balance of hardships is presumed to favor possession by petitioner unless the presumption is rebutted by a preponderance of the evidence, showing that the hardships to respondent substantially outweigh the hardships to petitioner . . . .

Id. § 14(b)(2).

123. The Wisconsin statute considered in Blazel v. Bradley, 698 F. Supp. 756, 763 n.4 (W.D. Wis. 1988), although purely civil in application, takes notice of the constitutional problems of indefinitely denying the rightful and sole owner of a residence the right to possession and enjoyment of that property. *See* WIS. STAT. § 813.12(3)(am) [sic] (1994) (allowing, but not requiring, a judge to limit an alleged victim's possession of a residence in which she holds "no legal interest" to "a reasonable time until [she] relocates").

of the defendant,[124] as well as the custody[125] and visitation[126] rights of the defendant with regard to his children, are other general liberty interests that a court issuing a CPO must consider. As in the case of property deprivations, however, very few jurisdictions require that courts consider these interests when issuing the orders that burden them. Where legislation does not require meaningful review and balancing based on the facts of an individual case, judges may be all too willing to ignore these safeguards.[127] Leaving to the discretion of a court what import, if any, to place upon an interest held by the domestic violence defendant cheapens the same interests held by the entire community.[128] A legislature is uniquely positioned to make a statement in favor of preserving the presumption of innocence and procedural protections for all citizens, in the same way it may make a powerful statement concerning the protection of all citizens from abuse in domestic settings. By setting out in the language of a statute, all the interests that a court must consider in fashioning the best conditions for pretrial release in domestic violence cases, lawmakers can ensure that a reasoned decision, insulated from the political pressures of the day, and particularly suited for the parties involved, is a just and best result.

VI. CONCLUSION

The issues that emerge in an analysis of criminal protection orders

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124. " 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the [due process] clause must be satisfied." Goss v. Lopez, 419 U.S. 565, 574 (1975) (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)).

125. *See* State *ex rel.* Williams v. Marsh, 626 S.W.2d 223, 230 (Mo. 1982) (holding that there is a liberty interest in the custody of one's children).

126. *See, e.g.*, Marquette v. Marquette, 686 P.2d 990, 995 (Okla. Ct. App. 1984) (finding that "interference with [defendant's] visitation rights is significant," but justifiable given statutory procedural safeguards, where an ex-parte civil protection order forbidding a domestic violence defendant from communicating with his ex-wife resulted in denial of his right to visit his children).

127. Judges may be uncomfortable issuing ex parte [civil] orders which evict the offender from the residence or award custody without the opportunity to be heard, but sometimes this must be done. . . . Property, custody, and due process rights of persons who have jeopardized the safety of others should yield to an expedited hearing.

Judge Linda Dakis, *Injunctions for Protection*, FLA. B.J., Oct. 1994, at 49.

128. It has been suggested that the factors for judicial consideration set forth in Mathews v. Eldridge, 424 U.S. 319 (1976), have created an environment where the full impact of a judicial burden upon a significant interest will often be ignored. "This focus on the practical consequences of the deprivation, in conjunction with the Court's apparent callousness, suggest that only when the deprivation is perceived as implicating a necessity of life will the factor carry much weight in the calculus." Nadine Taub, *Ex Parte Proceedings in Domestic Violence Situations: Alternative Frameworks for Constitutional Scrutiny*, 9 HOFSTRA L. REV. 95, 109 (1980).

transcend the parameters of the orders themselves. The concern for the rights of defendants in domestic violence cases must involve a careful scrutiny of the legislative, executive, and judicial responses to what is a unique and frustrating crime.

It has been the purpose of this Comment to identify some of the issues that must be addressed in measuring the efficacy and fairness of those responses, and to make concrete recommendations for judges and legislators who are creating and applying new approaches to an old problem.

First, and most obvious, courts must make factual findings, explicit in the record, when issuing criminal protective orders, for both ensuring reviewability by appeals court and providing for a better fact finding process.

Both courts and legislatures must take affirmative steps to ensure evidentiary rules in the CPO process are specifically set out and followed. Legislation allowing for CPO issuance should include a safeguard barring that issuance as evidence in a subsequent criminal trial. This should not be left to court discretion where many courts have institutionally adopted the practice of systematically issuing CPOs as a matter of course, without inquiry into the specifics of each case. Furthermore, where courts apply a civil "preponderance" evidentiary standard and place the burden upon a domestic violence defendant to show unreasonableness in release conditions, they unconstitutionally blur the time honored distinctions between the two fora and ignore the differences between the two types of proceedings.

Specifically legislating the statutory burden of proof required in hearings concerning criminal protection orders would provide needed guidance to the courts deciding such issues and better comport with due process requirements. Courts generally have not passed on the question of whether there is a higher evidentiary standard and where the burden of persuasion falls for evidentiary hearings regarding the issuance of criminal protective orders, yet these questions are critical to proper administration of justice and require immediate and careful consideration.

Procedurally, where a legislature fails to specifically provide for a hearing due to a defendant against whom a criminal protection order is issued, courts should imply such a provision into the statute to ensure that due process requirements are met. In practice, legislatures should use the Illinois CPO statute[129] as a model concerning defendants' right to use and retain possession of property. Moreover, courts should take

129. ILL. ANN. STAT. ch. 725, para. 5/112A-14 (Smith-Hurd Supp. 1995).

seriously the deprivation of the guaranteed right to enjoy property that will result from the issuance of a criminal protection order.

Failing to allow for victim input in the process of defining the conditions of pretrial release may be a further representation of the paternalistic standpoint courts have traditionally taken towards the victims of domestic violence and may be a further impediment to empowerment. Furthermore, an institutional presumption against taking seriously anything an alleged victim might say in support of the defendant seems especially unfair.

Legislatures should take care in defining the class of persons protected by remedial legislation to ensure they are in the first instance deserving of protection only afforded via the criminal protection statute. Likewise, legislation should not deny release to all defendants in domestic violence cases as a matter of course, but should allow for courts to make a reasonable factual inquiry into the specific reasons for denying bail to a defendant, even where the purpose of such denial is to allow for a cooling off period.

Concerns for equal protection for victims of domestic violence are certainly justified. Both the judiciary and the executive branches must be careful to ensure that traditional victims of domestic violence are protected in the same manner that all crime victims are protected.[130] The same standards should be applied to legislatures and judges who make and apply the laws related to domestic violence. Defendants charged with domestic violence should not receive a unique array of limited constitutional rights, but should be afforded the same protections that other similarly situated defendants are entitled to receive.

The result of a critical examination of the pretrial process of the domestic violence defendant will, ideally, lead to a judicial response that considers and meets the needs of all the actors in a particular case, and that fashions a remedy best suited to aid in eradicating such violence from our society.

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130. *See, e.g.*, Thurman v. Torrington, 595 F. Supp. 1521 (D. Conn. 1984) (holding as actionable an equal protection claim by a woman who was repeatedly stabbed and kicked by her husband in front of a number of police officers who failed to arrest the attacker until he finally headed for his victim once again as she lay on an ambulance stretcher). The jury awarded the victim $2.3 million, with the trial judge asserting "[a] police officer may not knowingly refrain from interfering and may not decline to make an arrest simply because the assailant and the victim are married. Such an action on the part of the officer is a denial of equal protection of the law." *Quoted in* BUZAWA & BUZAWA, *supra* note 70, at 158.